Small Group: Alien Tort Statute After Sosa

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Overview

In this small-group session, we consider the use of the Alien Tort Statute of 1789, 28 U.S.C. 1350 ("ATS"), after the Supreme Court's decision in Sosa v. Alvarez-Machain, and especially the use of civil actions in U.S. courts to advance human rights claims. Although the domestic courts of the various nations can offer no perfect solution to the inadequacy or ineffectiveness of human rights standards, they do potentially offer a critical alternative to two more visible modes of enforcement, namely (i) internalization, i.e., the incorporation of human rights norms into the training and decision-making of government officials, and (ii) internationalization, i.e., the operation of intergovernmental organizations, NGOs, and international tribunals in adopting or defining human rights norms and investigating and prosecuting violations.

The fact is that U.S. courts have conscientiously applied international human rights law in the private context of civil litigation brought by survivors seeking money damages from human rights violators. In fact, compared with other nations, the United States offers a more expansive civil jurisdiction over violations of international human rights law, even as it lags far behind other nations in assuring that its courts have criminal jurisdiction to try human rights abusers. Specifically, since 1980, the courts have ruled that the ATS, sometimes referred to as the Alien Tort Claims Act, provides jurisdiction over such cases, even when the violations occurred entirely outside of the United States and involved exclusively citizens of other nations. Today, the ATS has been used in scores of human rights cases, and a substantial body of doctrine and practice has been developed, even extending in principle to cases against multinational corporations for their alleged complicity in human rights violations outside the United States.

The Alien Tort Statute, adopted as part of the Judiciary Act of 1789, provides in its modern form that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. Although the origins of the ATS are obscure, the First Congress of the United States evidently intended to empower the federal courts to hear tort cases implicating the fundamentally federal interests in foreign nationals and the interpretation of international law. Any young government might wish to publicize some similar commitment to the law of nations, and contemporary analysts have speculated that a handful of incidents would have been in the public consciousness at the time, including acts of piracy, attacks on diplomats, and certain maritime torts.

The fountainhead of contemporary human rights litigation under the ATS is the case of Filártiga v. Peña-Irala, a decision rendered in 1980 by the Second Circuit Court of Appeals. Filártiga might be viewed as merely procedural decision at the pre-trial stage, determining the jurisdictional reach of an obscure federal statute in a human rights case, allowing the case to go forward without resolving the underlying dispute on the merits for either party. But the more complete appreciation of the case starts with the recognition that it exemplifies some of the fundamental changes in contemporary international law and its role in domestic litigation, including, among other things, the progressive narrowing of exclusive domestic jurisdiction, the declining relevance of the distinction between state and non-state actors, the correlative demise of the public/private distinction, and the gradual attenuation of the distinction between treaty and custom.

At a less abstract level, you may also expect certain key issues and their resolution in contemporary litigation under the ATS, because they recur whenever international law is at issue and whenever international actors are involved in domestic litigation.

For example:

1. By what warrant do the domestic courts apply international law? In other words, why is it legitimate for a domestic court to turn to international standards in the first place? How do the courts articulate the status of international law in U.S. law?

2. To the extent that a treaty or customary norm is relevant, does it provide a rule of decision or perhaps a private right of action? Does it operate of its own force (e.g., by incorporation) or does it simply "tilt" the interpretation of domestic statutes or the common law?

3. How do parties prove the content of international law, including the requirements of custom or the interpretation of a treaty's text? How are scholarly writings used?

4. The courts will sometimes express reluctance to apply or interpret international law. When are the "doctrines of judicial diffidence" relevant (e.g. the political question doctrine, foreign sovereign immunity, or the act of state doctrine), and how are they applied?

5. How shall the predictable logistical issues (personal jurisdiction, service of process, discovery) be resolved?

6. To the extent that a case might be brought in another country, when should the court respect the choice of the United States as the forum?

7. What are the prospects for enforcing the judgment in the United States and elsewhere? If a foreign judgment is involved, what doctrines of transnational res judicata are applicable?

THE SOSA LITIGATION

From 1980 to 2004, the Supreme Court declined to review nearly a dozen ATS cases decided by the courts of appeal. Although there was substantial uniformity of opinion in the appellate courts, it was only a matter of time before the Court would accept an ATS case and review and interpret the statute for the first time.

The first case arose from an en banc decision in the Ninth Circuit in Alvarez v United States, 331 F. 3d. 604 (9th Cir. 2003). The Alvarez case had a long and tangled history. The case arose from the 1985 torture and murder of a Drug Enforcement Administration ("DEA") agent, Enrique Camarena, and his pilot in Guadalajara, Mexico. After Agent Camarena's body was discovered, the Untied States understandably sought to bring all those responsible for this crime to justice, preferably in the United States. The DEA launched Operation Leyenda for this purpose. In the 1980s, many of those responsible for Camarena's torture and execution were brought to justice in the United States or were convicted and imprisoned in Mexico.

One of the suspects who initially avoided apprehension was Dr. Humberto Alvarez-Machain. The United States alleged that Dr. Alvarez injected Camarena with a drug to keep him alive during his torture so that cartel members could ascertain the extent of Camarena's knowledge of the activities of the cartel. According to the U.S. government, they made informal attempts to arrange for Dr. Alvarez' informal rendition to the U.S. but these efforts failed. In early 1990, a Los Angeles-based grand jury indicted Dr. Alvarez for Agent Camarena's murder. An arrest warrant was issued by a federal district judge but only authorized Alvarez' arrest within the territory of the United States.

On April 1, 1990, former police officers hired by the DEA, several Mexican nationals, abducted Dr. Alvarez from his medical office in Guadalajara and hid him in a hotel in a nearby city overnight. The next morning they flew him in a private plane to El Paso, Texas, where he was handed over to waiting DEA agents. Mexico formally protested Dr. Alvarez' abduction immediately and issued formal requests for the extradition of the DEA officials (Hector Berrellez and Antonio Garate-Bustamonte) responsible for the abduction.

Dr. Alvarez' appointed criminal defense lawyer filed a motion to dismiss arguing, inter alia, that the abduction violated the U.S.-Mexico Extradition Treaty. The district judge granted this motion, though he found Dr. Alvarez' claims of mistreatment during the abduction unconvincing. See United States v. Caro-Quintero, 745 F.Supp. 599 (C.D. Cal. 1990). The Ninth Circuit affirmed. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991). The U.S. Supreme Court reversed this decision, finding that the Extradition Treaty did not explicitly bar abductions and declining to read the treaty in the broad context of customary norms prohibiting one country from exercising law enforcement jurisdiction in the territory of another. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

Dr. Alvarez went to trial in November 1992 and, after the prosecution rested its case, the district judge granted a motion for acquittal, finding that the prosecution's cases was based on mere "speculation" and "wild hunches" and not on evidence sufficient even to submit the case to a jury. Dr. Alvarez was returned to Mexico that evening. In 1993, Dr. Alvarez filed a civil suit under the ATS and the Federal Tort Claims Act ("FTCA") seeking damages against the United States as well as all of the DEA officials and Mexican nationals involved in his abduction. (With limited exceptions, the FTCA is sole basis on which to bring tort claims against federal officials, and explicitly disallows claims that arise in a foreign country.) After interlocutory appeals, Alvarez v. United States, 107 F.3d 696 (9th Cir. 1996), and years of discovery, Dr. Alvarez prevailed in his ATS claim against one of the Mexican nationals, Francisco

Sosa, for arbitrary arrest and detention in violation of international human rights law and for the violation of Mexican sovereignty. Alvarez-Machain v. United States, No. CV 93-4072 SVW, 1999 U.S. Dist. LEXIS 23304 (C.D. Cal. Mar. 18, 1999). Alvarez' ATS claims against the United States were dismissed. His claims against individual federal defendants were subject to the Westfall Act, which allows the United States to substitute itself as a defendant in cases brought against individual federal officials. At the trial on damages, the district judge awarded him $25,000 in damages for the abduction. Because of the valid federal arrest warrant, the district judge cut off Dr. Alvarez' damages at the moment he was handed over to DEA agents in El Paso on April 2, 1990, and rejected the argument that Dr. Alvarez' detention actually lasted for 20 months until his release on December 14, 1992, making it a prolonged arbitrary detention in violation of international law. He was awarded damages for the less than 24 hours between his seizure and his release in El Paso the following day. Sosa appealed from the $25,000 judgment against him, and Dr. Alvarez appealed the dismissal of the claims against United States under the FTCA. On September 11, 2001, a panel of the Ninth Circuit affirmed the judgment against Sosa but reversed the summary judgment against the United States finding, based on the "headquarters doctrine," that the United States could be sued under the FTCA notwithstanding the exception for claims arising in foreign countries. The court found that since DEA officials had controlled the abduction operation from U.S. territory, the foreign country exception did not apply. Alvarez v. United States, 266 F.3d 1045 (9th Cir. 2001).

The Ninth Circuit reheard this decision en banc and, in June 2003, affirmed the judgment against Sosa by a 6-5 vote. Alvarez v. United States, 331 F.3d 604 (9th Cir. 2003). The panel found that Dr. Alvarez lacked standing to assert Mexico's sovereign claims relating to the abduction, Id. at 616-17, but agreed that the abduction had violated his right to be free from arbitrary arrest and detention. The en banc panel also affirmed the decision in Dr. Alvarez' favor under the FTCA. The court rejected the argument that the DEA's authorizing statute permitted the agency

to conduct extraterritorial seizures, in part relying on Dr. Alvarez's argument that the statute had to be read in light of the customary law prohibition on extraterritorial law enforcement operations conducted without the consent of the territorial state. Id. at 629.

The stage was set for review by the Supreme Court. By this time, different interest groups began to see the potentially expansive implications of ATS legation. The corporate community had the ATS on its radar screen because of cases like Doe v Unocal, which had alleged corporate responsibility and liability for human rights violations associated with the building of an oil pipeline in Burma (Myanmar). ATS litigation also implicated the interests of the executive in prosecuting the "war on terror." Indeed, the United States, in its amicus brief, urged the court, to take a restrictive view of the ATS to prevent the courts from impinging on the foreign policy prerogatives of the executive. The question of whether the United States could kidnap Al Qaeda operatives or Osama Bin Laden himself was just below the surface of the case as it came before the court in March 2004.

Thus, the Alvarez case became enmeshed not only in the war on terror, but also in the debate about corporate accountability for complicity in human rights violations abroad.